

DOCUMENT RESUME

ED 268 674

EA 018 417

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TITLE Section 1983 Liability: Recent Developments in the
Merger of State and Federal Remedies.
INSTITUTION National Organization on Legal Problems of Education,
Topeka, Kans.
PUB DATE 85
NOTE 19p.; In: Jones, Thomas N., Ed., and Semler, Darel
P., Ed. School Law Update 1985. National Organization
on Legal Problems of Education, 1985 (ED 018 409).
PUB TYPE Historical Materials (060) -- Reports - Descriptive
(141)
EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Administrators; Boards of Education; *Civil Rights;
Constitutional Law; *Court Litigation; Elementary
Secondary Education; Federal Courts; Federal State
Relationship; *Legal Responsibility; *Public Schools;
School Districts; School Law; State Officials;
Student Rights; *Torts
IDENTIFIERS *Civil Rights Act 1871; Fourteenth Amendment;
*Supreme Court

ABSTRACT

Section 1983 of the Civil Rights Act of 1871 was designed as a flexible and broadly scoped statute to restrict a wide variety of actions of state officials. During the past 15 years the number of court cases in which provisions of the 1871 act have been applied to school-related issues has increased geometrically. In 1961 the provisions of the act were made applicable to local public school board members and administrators; in 1975, the act was subsequently interpreted by the Supreme Court as a protection for students. In 1980, the Supreme Court ruled that a local governmental body whose official policy or custom violated a person's constitutional rights is not entitled to immunity from damages. This case, testing good faith immunity of municipalities, was subsequently held applicable to local public school boards. A number of cases during the period from 1961 to 1981 are examined. During that time court decisions increased considerably the vulnerability of school boards, school board members, and school officials for the actions they may have taken that resulted in a deprivation of someone's rights. A brief review of selected cases demonstrates the trend over the past two years for aggrieved persons to seek remedy in federal court through section 1983 where state remedy is either inadequate, nonexistent, or inoperative. School officials are advised to gain a better understanding of the concepts of civil rights tort law. (MLF)

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Section 1983 Liability: Recent Developments in the Merger of State and Federal Remedies

Richard S. Vacca

Introduction

The Civil Rights Act of 1871 (hereafter referred to as section 1983) provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.¹

Simply stated, section 1983 was designed as a flexible and broad scoped statute to restrict a wide variety of actions of state officials. When acting in their official capacities, these officials (exercising a portion of the state's authority) cannot move to restrict or deny any person subject to them any right to which an individual is entitled under the Constitution as well as under federal laws. If a state official acts in derogation of one's protected rights, that official may be charged with a constitutional or civil rights tort.

When the Civil Rights Act of 1871 was enacted by Congress in the decade following the Civil War, the new law was designed primarily to ensure that newly emancipated blacks would be entitled to the same rights as other citizens. The Act was intended to bestow the guarantees of the fourteenth amendment on all black and white citizens. Its sponsors could not have envisioned the scope of its coverage 113 years later. Indeed, during the last two decades it has undergone a metamorphosis that many congressmen and judges might not have foreseen. Today, its impact is considerable on those involved in public education.

1. The material contained in this Introduction is taken directly from R. Vacca & H. Hudgins, Jr., *Liability of School Officials and Administrators for Civil Rights Torts* (1982).

For many years, the Civil Rights Act of 1871 (42 U.S.C. section 1983) was largely ignored; but almost a century later, in 1961, the provisions of the Act were made applicable to local public school board members and administrators; and, in 1975, the Act was subsequently interpreted by the Supreme Court as a protection for students. In 1980, the Supreme Court ruled that a local governmental body whose official policy or custom violated a person's constitutional rights is not entitled to immunity from damages if its officials acted in good faith and in accordance with settled constitutional law. This case, testing good faith immunity of municipalities, was subsequently held applicable to local public school boards also.

During the past fifteen years the number of court cases in which provisions of the 1871 Act have been applied to school-related issues has increased geometrically. The number of court decisions began to increase steadily in the early 1970s. In 1979, the *Yearbook of School Law* reported an astonishing 1000% increase during the prior half-decade in court decisions that were based upon provisions of the 1871 Civil Rights Act. Thus, in a short period of our history, this piece of civil rights legislation has become what Thomas Shannon (Executive Director of the National School Boards Association) has referred to as the most significant malpractice law for people in public education in this country.

The status of court suits taken by plaintiffs against public school systems was best summarized by Delon and Bartman. In their view, "the number of actions under 42 U.S.C. section 1983 of the Civil Rights Act of 1871 continues to increase at a dramatic rate. It appears that more attorneys who represent school employees now realize the importance of this federal statute."

As the number and bases of constitutional or civil rights tort cases have expanded, as have the amounts of damages sought (both punitive and compensatory), and equitable remedies. When the Act was first applied to school officials, no monetary damages were sought. Since then, however, plaintiffs have sought and been awarded increasing amounts of money, and some settlements have amounted to hundreds of thousands of dollars.

Not unexpectedly, this increasing litigation has been paralleled by a continuing metamorphosis in the interpretations by courts of what exactly constitutes good faith behavior on the part of (1) a school board as a corporate entity, (2) school board members in their official capacities and as individuals, and (3) school administrators in their official capacities and as individuals. For decades the aforementioned were immune to civil rights tort suits under section 1983. That, of course, is no longer true, and the resulting challenge for all

concerned is to determine from the hundreds of cases that have been adjudicated since the early 1960s exactly what constitutes good faith behavior for boards and their members today.

For local school districts and their school board members, the dramatic increase in court actions based on the 1871 Civil Rights Act and the apparent ambiguity regarding good faith have had serious repercussions. First, court actions cost money and inevitably divert funds from a district's total educational program. Court settlements of damages can be very costly, and even when cases can be resolved before getting into court or when they are resolved in favor of the defendants, they will still require substantial expenditures of funds by a district. In addition, school districts have had to rely more on legal counsel and pay increased costs for insurance coverage.

Unfortunately, given rapid changes in the courts' interpretations of section 1983 and its applicability to school districts, many school board members and their administrative officers do not have a full understanding of the balance between their roles as policy-makers and the rights of individuals under their jurisdiction. They may believe that a proposed policy is proper and in the best interest of the district, when, in fact, that policy may conflict with the duly constituted rights of an individual. Conversely, a teacher or student may claim a right that is not deserved or that is detrimental to the school community, and the board may need to intervene and make a decision that is properly within its province.

Through the court suits it has spawned, section 1983 is now responsible for a considerable portion of the litigation brought by teachers and students against school boards and school board members. As a result, the expanding court interpretations of what constitutes constitutionally protected rights in school settings have dramatically altered traditional relationships among school boards, their members, their professional staffs, and their students and parent clients.

To gain a better understanding of more recent developments of section 1983, it is necessary to look briefly at the period from 1961-1981. During that time (referred to as the foundational era of section 1983 suits), court decisions increased considerably the vulnerability of school boards, school board members, and school officials for the actions they may have taken which resulted in a deprivation of someone's rights. The courts established this vulnerability through a series of interpretations of section 1983 as it applied to state and local officials serving in a superordinate capacity and to governmental bodies as corporate entities.

The Foundational Development of Section 1983 (1961-1981)

For almost a quarter of a century we have witnessed a growing volume of court activity involving section 1983. A brief review of selected, significant court decisions follows.

The United States Supreme Court in *Monroe v. Pape* (1961)² clarified the applicability of section 1983 to local governmental bodies and their agents. In that decision the Court held that, although a municipal entity cannot be held liable under section 1983, an official can be liable. Five years later the Fourth Circuit, in *Johnson v. Branch* (1966),³ said that school board members may be subject to legal action under section 1983.

In 1974, the Supreme Court, in *Scheurer v. Rhoads*,⁴ distinguished between a suit against a government body and a suit against a governmental official. Officials, opined the Court, have considerably less protection in section 1983 suits than does the government body itself. The following year, in a public school student discipline case, *Wood v. Strickland*,⁵ the Supreme Court both modified and clarified *Scheurer*. In rejecting the school board members' claims to *absolute immunity*, the high court instead adopted the standard of *qualified good faith immunity*. However, said the court, public school pupils may sue a school board member under section 1983 if the school board member

knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the students affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.⁶

The *Wood* decision (1975) initiated a number of questions for subsequent courts to answer about the meaning of qualified good faith immunity.

Three years after *Wood*, the Supreme Court in *Cary v. Phiphus* (1978) addressed the question of damages as it relates to the deprivation of rights of students.⁷ The Court treated two issues: the condi-

2. *Monroe v. Pape*, 365 U.S. 167 (1961).

3. *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966).

4. *Scheurer v. Rhoads*, 416 U.S. 232 (1974).

5. *Wood v. Strickland*, 420 U.S. 308 (1975).

6. *Id.* at 322. See also *Harlow v. Fitzgerald*, 50 U.S.L.W. 4815 (U.S. 1982), wherein the Supreme Court placed the emphasis on liability of officials where "clearly established rights" were present.

7. *Cary v. Phiphus*, 435 U.S. 247 (1978).

tions that warrant the awarding of damages, and the amount of damages that can be assessed local school officials. By a vote of 8-0 the Supreme Court held that students were entitled only to nominal damages, absent proof of actual injury. Where a showing of actual injury is made, said the Court, there may be recovery of substantial damages appropriate to compensate such injuries, and punitive damages may be awarded to deter or punish malicious deprivations of rights.

That same year (1978) the Supreme Court reversed the *Monroe* principle in *Monell v. Department of Social Services*.⁸ *Monell*, a New York case, involved female employees who sought injunctive relief and back pay for defendants' actions in compelling them, as pregnant employees, to take unpaid leaves of absence from their jobs before they were medically required to do so. The Supreme Court's reasoning, speaking through Justice Brennan, is that a local governmental body can be sued if the action alleged to be unconstitutional was a result of a "government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983."⁹ Beyond that, the Court did not make a statement on the precise nature of these practices.

In *Owen v. City of Independence* (1980), the Supreme Court established that local governing bodies are more vulnerable to suits under section 1983 than are their officers. Acting consistent with the *Wood* holding, the justices stated that, unlike government bodies, government officials may continue to enjoy good faith immunity. When government bodies violate, either through custom or policy, a person's protected rights, the governmental body is not entitled to immunity from damages. Further, the governmental body may not rely on the good faith of its officers as a defense to its own liability under section 1983.¹⁰

Where the above decisions established a remedy under section 1983 to individuals whose constitutional rights had been violated, a case out of Maine extended that interpretation to be applicable to individuals whose federal statutory rights had been violated. In *Maine v. Thiboutot* (1980) the Supreme Court ruled that, where a federal statute provides an exclusive judicial remedy, section 1983 does not apply, a point reiterated in subsequent decisions. Conversely, the Court said that section 1983 suits may be premised on violations of federal statutory laws that do not provide equitable or

8. *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

9. *Id.* at 694.

10. *Owen v. City of Independence*, 445 U.S. 622 (1980).

compensatory relief.¹¹

In 1981, another major Supreme Court decision on point arose out of Newport, Rhode Island. It raised the issue of whether section 1983 was intended to allow punitive damages against a municipality. Since the Court had already determined that compensatory damages could be awarded against a corporate body, *Newport* sought to extend previous rulings. The Court divided 6-3, the majority holding that punitive damages could not be assessed. Speaking for the majority, Justice Blackmun held that neither a history of the Act nor policy considerations justify "exposing a municipality to punitive damages for the bad faith actions of its officials." Section 1983, he said, was designed to expose certain state and local officials to a new form of liability. Punitive damages against the municipality, however, punishes the taxpayers, not the wrongdoers.¹²

Finally, in another decision from that year (1981), the Supreme Court established the initial question to answer in determining the feasibility of taking a civil rights tort action. Raised in the *Pennhurst State Board*¹³ case (a matter involving federal statutory protections for developmentally disabled persons), the question was: "How does an individual create statutory rights in the first place?" Since the *Pennhurst* decision, the scope of section 1983 remedies for alleged federal statutory violations seems to have been limited.¹⁴

In summary, the following foundational principles of law concerning section 1983 were established as a result of the cases decided between 1961-1981: (1) Legal (e.g., compensatory damages) and equitable remedies (e.g., injunctive relief) were possible in matters where the official actions of school officials or their agents violate the federal constitutional and/or statutory entitlements of an individual; (2) Qualified and not absolute immunity was possible as a defense where school officials acted in good faith to carry out their responsibilities; (3) Punitive damages could not be assessed against a governmental unit (e.g., the school board) but might be possible against an agent of the official body; and (4) Civil rights tort suits are remote where school officials can justify their policies and decisions as being necessary in the furtherance of some legitimate educational purpose.¹⁵

11. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

12. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981).

13. *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981).

14. See M. McCarthy, *The Developmentally Disabled Assistance and Bill of Rights Act: Pennhurst v. Halderman* in S. Thomas, N. Cambron-McCabe & M. McCarthy, *Educators and the Law: Current Trends and Issues* (1983).

15. For an excellent treatment and summary of the formative period of section 1983 litigation see N. Cambron-McCabe, *School District Liability Under Section 1983 for Violations of Federal Rights*, 10 NOLPE Sch. L.J., at 107-108.

Recent Developments in Section 1983 Litigation

The language of section 1983 was directed at acts of misconduct and abuse by state officials. Thus, the presence of "state action" is and always has been the *sine qua non* in building a section 1983 case. In section 1983 actions the burden always has been on the plaintiff to show (1) the conduct complained of was carried out under color of state authority and (2) the conduct complained of deprived the plaintiff of some entitlement protected by either the Constitution or by federal statute.¹⁶

In effect, the purposes of the Act were "to provide a remedy where a theoretically adequate state remedy is not available in practice, and to provide a remedy in the federal courts supplementary to any remedy which any state might provide."¹⁷ To put it another way, not only was section 1983 intended to supplement existing state remedies, but to override existing state remedies if they are judged to be either inoperative or inadequate.

Since the possibility exists that a Section 1983 case might come to federal court even after settlement in state court, a question may arise regarding the potential applicability of *res judicata*. Speaking directly to this concern Levenson has said,

[t]here is little reason to fear that allowing 1983 actions after state court proceedings will permit double recovery. Section 1983 was designed, in part, to provide remedies that are not available or not commonly sought in the state forum. Further, the majority of 1983 cases which follow state proceedings are brought precisely because the state judgment did not prove satisfactory.¹⁸

16. 15 Am. Jur. 2d 305. See, e.g., *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982). In *Pratt v. Taylor*, 101 S. Ct. 1908 (1981), the Supreme Court spelled out the initial inquiry regarding the taking of a section 1983 action in a two-pronged standard. First, whether the conduct complained of was committed by a person acting under color of state law. Second, whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

17. *Vacca & Hudgins*, *supra* note 1 at 24-25. Recently, in *Enright v. Board of School Directors*, 346 N.W.2d 771 (Wis. 1984), the court was faced with a suit filed by parents under both section 1983 and the common law of negligence. To the Wisconsin court, in a negligence pleading under section 1983 the court first must determine whether any state governmental unit provides redress that satisfies the requirements of procedural due process. And, said the court, just because state remedies may not provide all relief sought—which may have been available if plaintiff had proceeded solely under section 1983—does not mean that state remedy is inadequate.

18. *Vacca & Hudgins*, *supra* note 1 at 25. Commenting on section 1983 in a recent case brought by a discharged college librarian, the West Virginia Supreme Court said: "It appears that in a section 1983 action, the United States Supreme Court has

It should be emphasized at this point that section 1983 was never and is not now intended to exist as an avenue to circumvent existing sources of remedy.

The possibility does exist that those individuals who once would have taken their initial complaint to a state court will now seek remedy in a federal court rather than state court. In recent years section 1983 has become an alternative for advocates seeking remedy for alleged civil rights violations where no remedy was available in a state forum, or where available remedy was considered inadequate.¹⁹

A brief review of selected cases in four issue areas follows and is intended to demonstrate a trend over the past two years for aggrieved persons to seek remedy in federal court through section 1983 where state remedy is either inadequate, non-existent, or inoperative.

Patsy v. Board of Regents and the Exhaustion of State Remedies

Generally, every state provides legislative, administrative and judicial remedies for aggrieved citizens. The traditional rule holds that an individual should exhaust state legislative or administrative remedies before challenging state action in federal court.²⁰ Generally, state judicial remedies need not be exhausted unless so provided by statute. What about the question of exhaustion of state remedies where they are either ineffective or nonexistent?

In 1982, the Supreme Court decided *Patsy v. Board of Regents*.²¹ A Florida case, *Patsy* involved allegations of both race and sex discrimination by an employee of Florida International University. *Patsy* sought, among other things, damages and injunctive relief in a

fashioned a federal common law of damages designed to make the damage remedies uniform and not necessarily dependent upon the law of the state where the cause of action arose." The Court also commented that the collateral source rule does not require that the damages awarded under section 1983 be reduced by the unemployment benefits paid the plaintiff while she was out of work. See *Orr v. Crowder*, 315 S.E.2d 593 (W. Va. 1983).

19. *Vacca & Hudgins* *supra* note 1 at 82. In a recent public school student suspension case the United States District Court, Eastern District of Pennsylvania, reminds us, regarding the federal rules of civil procedure:

Where a claim arises under state law and the parties on either side of the claim are non-diverse, a district court has not independent federal jurisdiction. In such cases, the court may not hear the claim unless it falls within its power of pendent jurisdiction. Where, as here, the state and federal claims derive from a common nucleus of operative fact and are such that they would ordinarily be expected to be tried in one judicial proceeding, then the court has the power to hear the state claim provided issues are substantial Ordinarily, if the federal claim as pleaded is sufficient to confer subject matter jurisdiction on the court, it is substantial See *White v. Salisbury Township*, 588 F. Supp. 608 (E.D. Pa. 1984), at 615.

20. *Vacca & Hudgins*, *supra* note 1 at 24.

21. *Patsy v. Board of Regents*, 102 S. Ct. 2557 (1982).

federal district court. The Florida Board of Regents argued that her complaint should be dismissed since she had not exhausted available state administrative remedies. The district court agreed with the board of regents and granted a motion to dismiss.

The Fifth Circuit interpreted section 1983 and held that exhaustion of administrative remedies may be necessary. The case was remanded to the district court to evaluate the adequacy of existing administrative remedies.

The Supreme Court subsequently reversed the Fifth Circuit. Except in matters involving prisoners and other institutional persons, said the Court, exhaustion of state administrative remedies generally is not a prerequisite to an action under section 1983. Thus, the Court would not impose such a rule where exhaustion of remedies was not required by legislative enactment.

More recently, a 1984 case out of the Third Circuit, *Cohen v. City of Philadelphia*,²² treated the issue of the availability of state judicial review of a city civil service commission's decision to reinstate a wrongfully discharged police officer, but without awarding the officer back pay. Rather than appeal the commission's decision in the state court system, the officer brought an action in federal court pursuant to section 1983.

In *Cohen*, the Third Circuit held that "substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary."²³ What is more, said the Court, "the state has provided the officer with due process by providing reasonable remedies to rectify a legal error by a local administrative body, and that therefore he has not alleged a constitutional violation entitling him to sue under section 1983."²⁴ The court then made the point that "the very existence and efficacy of such remedies defeats his claim that he was deprived of property without due process of law."²⁵ The impact of recent section 1983 decisions was summarized best by Thomas and Fritz. In their analysis of *Patsy*, they state,

22. *Cohen v. City of Philadelphia*, 52 U.S.L.W. 2711 (U.S. June 26, 1984), at 2711.

23. *Id.*

24. *Id.* As the Fifth Circuit said this year in a corporal punishment matter, "Every tort committed by a state official is not a violation of constitutional rights. Every deviation from a state agency regulation does not constitute a denial of due process. The fourteenth amendment did not make every trespass by a state government a deprivation of federal constitutional rights." *Woodard v. Los Fresnos Indep. School Dist.*, 732 F.2d 1243 (5th Cir. 1984).

25. *Id.* For a recent decision involving the issue of exhaustion of state administrative remedies and parents challenging a school district's education plan for their physically handicapped child, see *Wilson v. Marana*, 735 F.2d 1178 (9th Cir. 1984). See also *Quackenbush & Johnson City Central School Dist.*, 716 F.2d 141 (2d Cir. 1983).

Section 1983 provides a broad base for law suits while relief may vary with the gravity of the offense (nominal to punitive). Jury trials are available under the Act and exhaustion of administrative remedies is not always required. Accordingly, the number of cases will continue to grow.²⁶

Flores v. Edinburg and the Merger of Negligent Torts with Civil Rights Torts

Since the growth of section 1983 actions, a distinction has been made between the new "civil rights tort" and the traditional "negligent tort." Simply stated, a tort is a civil wrong, other than breach of contract, for which a court (generally a state forum) will provide remedy in the form of money damages. The wrong grows out of harm to an individual by the unreasonable conduct of others. The remedy is premised on the notion that one should be allowed to recover from the one who harmed another person.²⁷

Until the mid to late 1970s, the case law on point showed clearly that public school systems liability for student and teacher injury was limited in state courts to the negligent or common law tort in such matters as broken bones, cuts, burns and the like, occurring in certain high risk areas (e.g., vocational shops, science classes, and physical education activities). The current liability arena, however, is expanding gradually to include section 1983 suits, taken in federal court. In the early cases, however, the typical federal court attitude was that plaintiffs' claims sounded more in tort as breaches of school board or teacher duties to students, and that such matters did not rise to the level of a constitutional claim cognizable in an action pursuant to section 1983. Recently, this traditional view has undergone some modification. A case on point is *Flores v. Edinburg Consolidated Independent School District*.²⁸

In *Flores* a public school student (David Flores, age fourteen), had cut his hand on a table saw while doing a class project (the class was an industrial arts woodshop). He was cutting a board on a power saw from which the safety guard had been removed one month earlier

26. S. Thomas & M. Fritz, *Exhaustion of Remedies Under Section 1983*; Patsy v. Board of Regents of the State of Florida, in Thomas, Cambron-McCabe & McCarthy *supra* note 14. According to Morris, the Supreme Court has, in effect, through subsequent decisions limited the *Thiboutot* opinion and restricted the application of section 1983 "to the vindication of federal statutory rights that are not accompanied by a detailed, comprehensive enforcement mechanism." See A. Morris, *Obstructing the Process of Justice in the Federal Courts*, 11 West's Educ. L. Rep. (July 28, 1983).

27. Vacca & Hudgins, *supra* note 1, at 7-8.

28. *Flores v. Edinburg Consol. Indep. School Dist.*, 554 F. Supp. 974 (S.D. Tex. 1983). The facts described in the paragraphs that follow are taken directly from *Flores*, at 976-977.

because it was broken.

At the time the student was cut (it should be pointed out that he received a serious and permanent injury), the teacher was out of the laboratory, and in his office. After the injury had occurred, the teacher was summoned from his office.

According to Frels and Horner, subsequently a section 1983 action was taken in federal district court. Ultimately, a \$500,000 judgment was rendered against the school district. At trial, the jury had been instructed that the injured student had had a *liberty interest* in a "safe environment at school."²⁹ And, if a public school violates this liberty interest (e.g., a safe and hazard free environment) and a student is injured, said the Court, this amounts to a constitutional deprivation without due process of law.

In their comprehensive analysis of *Flores*, Frels and Horner suggest that the court's decision, and other cases on point, demonstrates "as a trend toward recognizing that section 1983 provides a cause of action for the negligent deprivation of liberty interests."³⁰

The significance of *Flores*, state Frels and Horner, is summarized best by the following three points: (1) the decision extends the scope of section 1983, especially "concerning negligently-incurred deprivation of liberty interests"; (2) the decision demonstrates that liberty interests are definable and can be sufficient enough to warrant inclusion under section 1983; and (3) the decision demonstrates the potential for this type of suit in other education matters."³¹ If the *Flores* reasoning is followed, opine Frels and Horner, "a court might find a constitutional deprivation in the educational context even if only a slight, rather than egregious, abridgement of a plaintiff's liberty interest has occurred."³²

A key point in the above quotation is the notion of *egregiousness*. Generally defined as conspicuously bad, flagrant, and outrageous abuse of official authority and power, and something that "shocks the conscience of the court," the element of *egregiousness* has been, up to *Flores*, the "ultimate question in determining whether the claim is a simple tort or a constitutionally protected right."³³

29. For an excellent and complete analysis of the *Flores* case and its implications for section 1983 actions, see K. Frels & J. Horner, *The Negligent Deprivation of Liberty Interests under 42 U.S.C. Section 1983; Flores v. Edinburg Consolidated Independent School District*, 14 West's Educ. L. Rep. 615 (January 26, 1984).

30. *Id.* 618-619. It is interesting to note that the district court drew a parallel between the liberty interest of this student (when serious injury was caused by the teacher's negligence), and a student's liberty interest being implicated in a situation where corporal punishment has been applied by a teacher. *Flores*, 554 F. Supp., at 980.

31. *Id.* at 621.

32. *Id.* at 622.

33. *Id.*

In summary, Frels and Horner make the following judgment regarding the possible ramifications of the *Flores* decision:

Flores appears to alter the long-standing development of common law and constitutional tort law. Constitutional torts and common law torts are rolled into one indiscernible package, making local governmental entities, such as school districts, liable for virtually every negligent injury inflicted by one of its officers.³⁴

Flores was appealed to the Fifth Circuit where, on September 17, 1984, the appellate court reversed the district court and held that under Texas law the suit was barred by the doctrine of *res judicata*.³⁵ According to the court,

Plaintiffs, by acting diligently, could have brought all of their claims in the original suit in the Texas courts. Consequently, a successive suit grounded in the same operative facts cannot now be maintained. Plaintiffs have done no more in their section 1983 action than to advance a new theory of recovery; however, "the assertion of a theory of recovery different from that of the first suit is not enough to state a new cause of action under Texas law."³⁶

Under Texas law, said the Fifth Circuit, a different cause of action is not merely a different theory of recovery, but should differ in operative facts and measures of recovery.

In a concurring opinion Circuit Judge Garza disagreed with the majority's interpretation of Texas law, but agreed with the result reached in the case. In his opinion, *Flores* failed to establish that his section 1983 claim occurred as a result of an official policy, custom, or usage of the school district. In other words plaintiff was not injured as a result of an official policy, custom, or practice of the school district.³⁷ There is no evidence in the record, he said, to support the conclusions that school district officials had delegated policy-making authority to the teacher, or that it was the district's policy to maintain unsafe conditions in the woodshop, or that the teacher's practices were so persistent and widespread to constitute a custom at the school.³⁸

34. *Id.* at 623.

35. *Flores v. Edinburg Consol. School District*, 741 F.2d 773 (5th Cir. 1984).

36. *Id.* at 779.

37. *Id.* at 779-780.

38. *Id.* at 782.

Hall v. Tawney and the Search for Some Form of Remedy Post-Ingraham

Discipline and control of students is and always has been an integral part of an educational program, for without it teachers cannot teach and students cannot learn. A desirable discipline program not only provides a safe and hazard free environment for teachers and students, but also a proper climate which leads toward student self-direction and maturity. In most jurisdictions corporal punishment always has been available as a legitimate mode of student discipline and control.³⁹

Law on corporal punishment has not changed significantly through the years. The Supreme Court ruled for the first time in the 1970s on the legality of corporal punishment, and in two instances upheld the practice. In the more substantive of the two decisions, *Ingraham v. Wright* (1977),⁴⁰ the high court ruled that corporal punishment in public schools is not a violation of the eighth amendment's prohibition against cruel and unusual punishment. The Court held that this amendment did not apply to noncriminal matters and the children involved had other recourse, such as a civil suit in the state courts.

In 1980 the Fourth Circuit in *Hall v. Tawney* held that, in some instances, a student can recover damages under section 1983.⁴¹ Unlike *Ingraham* (where in addition to the issue of the legality of corporal punishment there was an issue of procedural punishment), *Hall* involved an issue of substantive due process (i.e., the right to ultimate bodily security) as it applied to corporal punishment. To the Fourth Circuit,

[t]he existence of this right to ultimate bodily security—the most fundamental aspect of personal privacy—is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process.⁴²

In *Hall* plaintiffs charged that a male teacher spanked their daughter with a homemade rubber paddle and, in an ensuing struggle, he shoved her against a desk, twisted her arm, and pushed her in presence of the school's principal who granted permission for the teacher

39. Vacca & Hudgins, *supra* note 1, at 214.

40. *Ingraham v. Wright*, 430 U.S. 651 (1977).

41. *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). The Court makes it clear, at the outset, that disciplinary corporal punishment per se does not violate a public school student's substantive due process rights.

42. *Id.* at 613.

to spank her. The teacher then spanked the girl again. As a result of the spanking, the girl was treated in a hospital for treatment for injuries to the hips, thighs, and buttocks.

The district court dismissed the action in light of *Ingraham*. Plaintiffs appealed to the Fourth Circuit, which ruled that corporal punishment does not per se violate a child's substantive due process rights. Also said the court, not every violation of state law or criminal assault law will amount to a violation of constitutional right. And, even though the court finally concluded that the student could not prove a claim which would entitle her to relief, it did say that if the force used is so great as to cause severe injury disproportionate to the need to maintain order and is so inspired by malice or sadism that it amounts to brutal and inhumane use of official power literally shocking the conscience, then a violation of substantive due process may be found.⁴³ One result of this case going into federal court and not to a state court (as seemed to be the appropriate forum post-*Ingraham*) was stated most succinctly by Clague:

Because Naomi Hall (like the *Ingraham* plaintiffs) chose a federal over a state judicial forum and sought judicial recognition of a new constitutional right to be poured into the empty vessel of the due process clause, her case enters the list in the lively debate over federal judicial activism.⁴⁴

To Clague, a future section 1983 action is possible since this old piece of civil rights law now occupies a position of being "the last possible constitutional check or the 'last resort' left in the wake of the Supreme Court's 1977 decision."⁴⁵

In 1983, a student sought money damages under both section 1983 and the state common law in a corporal punishment case in Virginia. Taking her case into federal district court and not into state court, the plaintiff claimed a deprivation of what she said was a fourteenth amendment right to be free from physical intrusions upon her person. Moreover, she said, there existed a liberty interest in avoiding punishment while in the care of school authorities.

43. This discussion of *Hall* is taken directly from Vacca & Hudgins, *supra* note 1 at 217. See also Hall, *supra*, at 613.

44. For an excellent and comprehensive analysis of this issue, see M. Clague, *Hall v. Tawney: Corporal Punishment and Judicial Activism*, 8 West's Educ. L. Rep. 909 (March 24, 1983), at 920.

45. *Id.* at 909. The 4th Circuit stated that the complaint did not state a cause of action against school officials who were not directly involved in inflicting the punishment, but did state a cause of action on behalf of the pupil against persons directly involved in the paddling. Hall, *supra*, at 615.

In this case, *Brooks v. School Board of the City of Richmond*,⁴⁶ the young student claimed that the deprivation of her rights occurred when her teacher disciplined her by piercing her arm with a straight pin. As a result of that punishment, she claimed both physical and psychological injury, each requiring medical attention.

Counsel for the teacher argued that, even if the facts were true, the student's claim did not constitute a recognizable claim under section 1983. This claim was based upon two grounds. First, since *Ingraham* (1977) the use of corporal punishment in schools did not implicate a constitutionally protected liberty interest of students.⁴⁷ Second, the state common law remedies available to plaintiff in this case were fully adequate.

In granting defendant's motion to dismiss, District Judge Warriner made the following pronouncements: To rise to the level of a substantive due process deprivation, the conduct of the disciplinarian must be brutal, inhumane, and conscious-shocking, and the plaintiff must be able to establish that it was the disciplinarian's intent to deprive the plaintiff of his/her constitutionally protected right.⁴⁸

Vail v. Board of Education: A Simple Contract Case and Remedy Under Section 1983.

Beginning in the early 1970s, and especially since 1976, teachers and other professional employees in public school systems have successfully used section 1983 to get their complaints of civil rights violations before the federal bench. As the case law demonstrates, their status in seeking remedy in federal court is not contingent upon holding tenured status in a school system. All that is necessary is for an employee to establish, at least at the prima facie level, that a civil rights violation (constitutional or statutory) is present. And, the burden falls squarely on the aggrieved employee to establish a deprivation cognizable under section 1983.⁴⁹

46. *Brooks v. School Bd. of the City of Richmond*, 569 F. Supp. 1534 (E.D. Va. 1983).

47. *Id.*

48. *Id.* For an earlier student discipline decision (a non-corporal punishment case) from District Judge Warriner, wherein he ruled against the plaintiff in a claim not cognizable under 42 U.S.C. § 1983, and thus awarded attorney's fees to prevailing school officials, see *Bernstein v. Menard*, 557 F. Supp. 90 (E.D. 1982).

49. As Alexander & Alexander have commented, "Property rights have been recognized when the teacher has tenure or a permanent contract, as provided by the legislature. Also the contractual agreement the employee has with the employer is a property right and cannot be breached during the contract period Liberty interests are involved if the employer stigmatizes the employee and jeopardizes one's opportunity for future employment. Stigmatizing the individual's good name or reputation is a violation of a teacher's liberty interest and will require due process of law." K. Alexander & M. Alexander, *The Law of Schools, Students, and Teachers* (1984), at 306.

Clearly, where school officials are liable under section 1983, the possibilities for remedy are broad. What makes these remedies in employment cases even more significant is that they do not necessarily preclude but may be used as supplementary or in place of state remedies.

In 1983, the Seventh Circuit heard an Illinois case which demonstrates the flexibility of section 1983 and its potential for taking employment issues into a federal forum for which adequate remedy exists in state court. The case is *Vail v. Board of Education*.⁵⁰

Mr. Vail was a supervisor of recreation and physical education at the Statesville Correctional Center in Joliet, Illinois. His family had lived in Joliet for thirteen years, and he had been in his job as supervisor for ten years.

Mr. Vail was contacted by the Paris, Illinois, schools regarding a job opening in that system as head football coach and athletic director. After expressing his interest in the job, initial contract deliberations began between Vail and the Paris school superintendent. All the way through the contract discussions, Mr. Vail expressed to the superintendent and to a search committee that he did not want to give up his position in Joliet unless he could be promised at least two years of employment in Paris. Ultimately, the Paris School Board directed the superintendent to convey an oral offer to Vail, including the board's intent (if Vail signed a one-year written contract) to renew his contract for a second year. Mr. Vail accepted the offer, signed the one-year contract, moved his family to Paris, Illinois, and assumed his new job.

In March of his first year in Paris, Vail was told that his contract would not be renewed. No reasons were given for the board's decision. Vail took his nonrenewal into federal district court. Not claiming any entitlement to tenure by Illinois law, Vail built his entitlement on what he said was the existence of a two-year contract. In his view this gave him more than a mere expectation of continued employment beyond that first year. Vail characterized his situation as a deprivation of a property interest without due process of law as guaranteed by the fourteenth amendment. He sought remedy under section 1983.

In its response to Vail's complaint, the Paris School Board claimed that in Vail's situation Illinois Law prevented the enforcement of a two-year contract since the state statutes preempted any property interest created by an "implied contract." The board stated that Vail possessed no more than a "speculative expectation of continued

50. *Vail v. Board of Educ.*, 706 F. 2d 1435 (7th Cir. 1983).

employment," and was entitled to notice of nonrenewal of his one-year written contract.⁵¹

The federal district court agreed with Vail and held that his was a protected property interest in continued employment. The school board, said the court, had acted under color of state law to deprive him of that interest without due process of law. Vail was awarded \$19,850.99 in stipulated damages. The Paris Board appealed to the Seventh Circuit.⁵²

The Seventh Circuit agreed with the district court. In reaching its decision, the appellate court seemed to focus upon Vail's *detrimental reliance*⁵³ on the board's promise. To the court, the board's promise of a second year of employment is what induced him to leave his job in Joliet and move his family ninety miles to Paris. The amount in damages was appropriate to remedy the detriment he suffered. In a dissenting opinion, Judge Posner saw the matter as one of simple contract law and one where there was adequate state remedy available to Vail.⁵⁴ In Judge Posner's opinion,

We are witnessing the trivialization of the Constitution. I regret almost more than I can say that my brethren's method of interpreting precedent has led them to take another step on the road whose terminus is the displacement of the whole of state law into the federal courts.⁵⁵

During the last term, the United States Supreme Court, by a vote of 4-4 (Justice Marshall did not participate), affirmed the Seventh Circuit's ruling in *Vail*. The value of the *Vail* decision is found more in what it indicates about the potential of section 1983 actions than in its possible value as precedent. The *Vail* decision expands the idea of public school employment as a property entitlement even where

51. *Id.* at 1439. The Board argued that any implied contract would be unenforceable because it arises from an ultra vires board act.

52. *Id.* at 1440. "A property right is created if the individual has a legitimate claim of entitlement to continued employment as created by state law or by the policies and procedures of the board." Alexander & Alexander, *supra* note 44, at 306. For a recent case on point, see *Hamilton v. Board of Trustees*, 319 S.E.2d 717 (S.C. 1984).

53. *Id.* This was a bargained for agreement (even though oral in nature) and the Paris School Board received some benefit from the agreement. Also, the board should have realized and expected that the oral promise of a second year of employment would induce a forbearance from Vail, that eventually worked an injustice on him and his family.

54. *Id.* at 1449. To Circuit Judge Posner, "There is no federal interest in this case, unless the Fourteenth Amendment is thought to invest with federal significance all state action, however unthreatening to the rights we deem fundamental."

55. *Id.* at 1456. For a more recent case on point, see *Goodrich v. Newport News School Board*, 743 F.2d 225 (4th Cir. 1984).

no tenure status exists; it demonstrates the use of section 1983, even where state remedy exists; and it shows how a matter heretofore taken into a state forum (contract action) might find its way into a federal court as a cognizable constitutional claim.

Concluding Statement

Over the years, section 1983 has proved to be a flexible and broad scoped statute covering a wide variety of actions of state officials. Given the generally established applicability of this statute to public school boards and school administrators and the expanding nature of section 1983 as demonstrated through the recent developments reviewed in this chapter, it behooves school officials to gain a better understanding of the concepts of civil rights tort law. Clearly, where school officials are held liable under section 1983, the possibilities for remedy are broad.

School officials who once believed that a matter of controversy involving an employee or a student was settled finally and firmly by either an administrative procedure or by a local or state court decision can no longer rely on that belief. Now, or at some point in time subsequent to such a decision, these same officials may find themselves facing a section 1983 action taken in a federal district court by the same employee or student.

During the coming years, as public school officials carry out their legal functions, the potential for becoming involved in section 1983 suits will remain a real possibility. In fact, section 1983 may have the most potential for taking public school officials into court.

As public school law enters the second half of the 1980s, the increasing use of section 1983 as an alternative action is evident. Where a federal court is convinced that a cognizable federal claim exists, public school matters that were once the exclusive province of state tribunals might be litigated instead in a federal forum. There is little doubt that such activity will have a profound impact on the day-to-day practice of public school administration as "routine" matters have the potential to ripen into a federal case.